83-2130

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

No. _____

Rene G. Rodriguez, Petitioner,

v.

United States of America, Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

A. Whether Petitioner received an illegal sentence where (1) he was convicted for conspiracy under 21 USC 846 and (2) his sentence was enhanced under 21 USC 841 (a), a criminal statute he had not been convicted of violating.

B. Whether Petitioner's constitutional right to confrontation of witnesses was violated where the trial judge refused to order the prosecution to reveal the bargain which had been made between the government and the witness.

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JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 1, 1984. Appellant Rodriguez's Petition for Rehearing was denied on March 28, 1984. This Petition for Certiorari is filed within 60 days of the date of the denial, in accordance with Rule 22 of the Supreme Court Rules.

The jurisdiction of this Court is invoked under 28 USC 1254 (1).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

No._____

Rene C. Rodriguez, Petitioner,

v.

United States of America, Respondent,

Petitioner, Rene Rodriguez respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the Fifth Circuit Court of Appeals is reported at _____F2d_____(1984), and is attached as Appendix A. The Order from which the Petitioner is appealing from in the United States District Court for the Southern District of Texas is dated 3-28-84 and is attached as Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 USC 841, 21 USC 846

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecution, the accused shall enjoy the right...to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Petitioner, Rene Rodriguez was indicted with Patrick Treacy, Jose Jimenez and Conrad Blessing for conspiracy to distribute a controlled substance,

21 USC §846. Jimenez was never arrested. The indictment against Treacy was dismissed on a Motion by the government. Blessing and Petitioner were both convicted as charged. On appeal the United States Court of Appeals for the Fifth Circuit overturned co-defendant Blessing's conviction deciding that the evidence was not sufficient to support the verdict. As such, Petitioner Rodriguez is the only one of the four original indictees who was convicted for conspiracy.

The conspiracy statute (21 USC 846) prescribes punishment in an amount:

> "which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 USC 846.

The maximum punishment prescribed for the offense which was the object of the conspiracy is five years imprisonment. (21 USC 841). The sentencing judge however, sentenced Petitioner on February 25, 1983 to eight years imprisonment, acting on his belief that a seperate enhancement

clause in 21 USC 841 could be applied to an offender convicted under 21 USC 846.

Petitioner appealed his conviction and sentence to the United States Court of Appeals for the Fifth Circuit which affirmed his conviction in an Opinion dated March 1, 1984. A Petition for Rehearing was denied on March 26, 1984.

WHY THE WRIT SHOULD BE GRANTED

A. Petitioner was erroneously subjected to a greater prison sentence than that permitted by the statute he was convicted under.

The first issue raised herein concerns an important question of federal law and it is a case of first impression which should be settled by this Court. A similar and analogous problem in this same statute caused great conflict among circuits before this Court took juridiction and resolved the matter in Bifulco v United States, 447 US 398, 100 SCt 2247 (1980).

Almost certain confusion will be avoided if this Court decides to grant the writ.

Petitioner was convicted for conspiring to

distribute methaqualone in violation of 21 USC 846. The substantive or target offense is described at 21 USC 841. Petitioner was not charged or convicted for violating the substantive offense. The conspiracy statute Petitioner under which Petitioner was convicted sets the maximum penalty as a period of incarceration which may not exceed the maximum punishment for the target offense.

In the instant case, the maximum penalty prescribed for the "target" offense [possession with intent to distribute methaqualone, 21 USC 841 (a)] is set at five years imprisonment and/or $5,000.00 in fines. Nonetheless, the trial court sentenced Petitioner to eight years imprisonment. This sentence exceeds the maximum incarceration permitted by the sentence and must be reversed.

The reason for the trial Court's erroneous sentence was a mistaken belief that a defendant found guilty under 21 USC 846 could be subjected to an increased sentence under the enhancement provisions of 21 USC 841. There is no authority to support the increased sentence.

Defendants convicted of violating 21 USC 841 who have prior drug convictions can have their terms of incarceration increased pursuant to the enhancement provision in 21 USC 841. This provision is an habitual offender act which relates exclusively to those convicted under 21 USC 841. Petitioner herein did not fit into that category.

While it is true that the statute for which petitioner stands convicted (21 USC 846) looks to the target offense statute for punishment provisions, it does not follow that it also adopts the enhancement provisions in the target offense.

This issue of statutory interpretation must be decided by looking at the wording of the applicable statutes. 21 USC §846 reads as follows:

> "Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed <u>for the offense</u>, the commission of which was the object of the attempt or conspiracy." (emphasis added)

The maximum punishment for this offense Petitioner was charged with committing is set out in 21 USC §841 (b) 1 (B) as follows:

> "In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than five years, a fine or not more than $15,000.00 or both."

Thus, it is clear that the five year maximum penalty applies to the Petitioner.

In the text of the target offense statute (21 USC 841) the punishment scheme is followed by a description of special parole provisions and then by a special sentence enhancement section. This Court has already reviewed a very similar issue arising out of that very statute. In Bifulco v United States, 447 US 398, 100 SCt 2247, (1980), the issue before this Court was whether 21 USC §846

authorizes a sentencing court to impose a term of special parole upon a defendant who is convicted of conspiring to manufacture or distribute a controlled substance.

As in the instant case, the object of the conspiracy in Bifulco was the commission of a substantive offense enumerated under 21 USC §841. In addition to imposing the fines and sentences authorized by the statute, the sentencing court in Bifulco imposed a term of special parole. The defendant's sentence and conviction was affirmed by the United States Court of Appeals.

Justice Blackmun, writing for this Court ordered Bifulco's conviction reversed. It was this Court's opinion that the legislative history, policy considerations, language and structure of the statute did not authorize imposition of the 21 USC 841 special parole conditions on a subject convicted under 21 USC 846. The reasoning of this Court in Bifulco should apply by analogy to the instant case. Application of the 21 USC 841 sentence enhancement conditions is inappropriate for an individual such as

the Petitioner, convicted under 21 USC §846.

Any ambiguity or uncertainty about the legislature's intentions must be resolved in favor of the defendant. In Bifulco, this Court recognized that the rule of lenity is a rule of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibition, but also to the penalties they impose. Quoting Ladner v United States, 358 US 169, 178, 79 SCt 209, 214.3 LEd2d 199 (1958), this Court stated:

> "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." 447 US at 387, 100 SCt at 2252.

In light of these principles, the rule of lenity requires that this Court reverse the judgment of the Court of Appeals and vacate the enhanced sentence which was imposed upon Petitioner.

B. Petitioner's constitutional right to confront witnesses was violated by the trial court's refusal to order that the prosecution reveal the bargain which had been made between the government and the witness.

It was clear from the proofs offered by the government at trial that Patrick Treacy was deeply in an attempt to purchase Mandrax tablets from undercover agents. Agent Martin had face to face meetings with Treacy as well as several telephone conferences to set up a purchase. During the course of this "preparatory period", Treacy gave government agents one ounce of cocaine, gave them ten thousand dollars, showed government informants $140,000.00 in cash and gave them a pound of cocaine valued at $40,000.00. (T 55, 56, 62, 226).

Immediately before jury selection, the government voluntarily dropped all charges against Patrick Treacy. Counsel for Petitioner Rodriguez moved to have the U.S. Attorney reveal what deal if any had been made with Mr. Treacy. The government refused to volunteer that information. Judge Vela

refused to compel the government to reveal the nature of the deal made with Patrick Treacy, noting defense counsel's exception. (T 37).

The Court:

> "I will not cause it (the deal between Treacy and the government) to be made available unless he is called as a witness. Anything else?"

Mr. Canales:

> "On behalf of Mr. Rodriguez, I have interviewed Mr. Treacy, Your Honor. Mr. Treacy has informed me that if I was to call him to the stand that he would invoke the Fifth Amendment privlege. I therefore, Your Honor, cannot call Mr. Treacy to the stand. That was one reason he gave me. The second reason he gave me, he would not testify because he had a plea bargain agreement with the government, Your Honor, that he would not testify I believe in this case." (T 238, 239).

Despite these factors recited to the Judge, Petitioner Rodriguez's request to have the plea

bargain revealed was denied.

This refusal by the trial court chilled appellant's right to confrontation of witnesses, as guaranteed by the United States Counstitution, Amendment VI. Petitioner contends that the non-disclosed evidence would have been crucial to the jury's assessment of Treacy's credibility and that the Court's adverse ruling affected defendant's ability to put forward an adequate defense.

In Giglio v United States, 405 US 150, 92 SCt 760 (1971), this Court ordered a new trial for a defendant after it had been discovered that the prosecution failed to voluntarily disclose a promise of leniency made to a witness. In making its decision, the court made reference to Brady v Maryland, 373 US 83 (1963) where it was held that suppression of material evidence justifies a new trial "irrespective of the good faith of the prosecutor." 373 US at 87. Chief Burger writing for the Giglio Court also cited with approval an American Bar Association standard for Criminal Justice, Section 3.11 (a):

"When the reliability of a given witness

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may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within this general rule." 405 US at 154.

The general rule referred to is granting the defendant a new trial.

Hearsay evidence from Treacy was introduced as evidence, to defendant's great detriment. Appellant's counsel was led to believe that the bargain Treacy made with the government required that Treacy could not testify as a witness for Appellant Rodriguez. (T 239).

Attempts by trial counsel to verify this information were timely made through a motion which was denied. As trial counsel observed in a remark to the trial court concerning the government's attempts to insulate Treacy from the other defendants:

> "I think the government Your Honor is playing games with the Court." (T34).

However this Court interprets the evidence, appellant has been denied the right to confrontation

of his accusers. If, in fact, the government made a deal with Treacy which required that he assert his Fifth Amendment privilege if called as a witness, the government has effectively procured his absence and denied appellant his right to confrontation.

If, on the other hand, no such deal was made, appellant was still deprived of his right to confront witnesses since the prosecution would not reveal their deal with Treacy. The barring of Petitioner from the impeachment evidence which he timely sought chilled his right to confrontation, and effectively denied him the rights he is entitled to under the United States Constitution, Amendment VI.

Moreover, the importance of this information to the defense is even more clearly revealed by examining the Fifth Circuit's opinion below regarding the sufficiency of the evidence. According to that opinion, the alleged link between Treacy and Petitioner comprised sufficient evidence to support a guilty verdict. Thus, denial of the right to confrontation under these facts is even more crucial and outcome determinative.

Therefore, Petitioner's conviction should be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-2159

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CONRAD JOHN BLESSING, III and

RENE GARCIA RODRIGUEZ,

Defendants-Appellants,

Appeals from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

(March 28, 1984)

Before CLARK, Chief Judge, POLITZ and JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT: 3-28-84

_____

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-2159

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CONRAD JOHN BLESSING, III and

RENE GARCIA RODRIGUEZ,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

---

(March 1, 1984)

Before CLARK, Chief Judge, POLITZ and JOHNSON, Circuit Judges.

CLARK, Chief Judge:

Conrad John Blessing, III, and Rene Garcia Rodriguez appeal their jury convictions for conspiring to possess with intent to distribute a controlled substance. Blessing

and Rodriguez assert several errors on appeal, the most significant being the sufficiency of the evidence supporting their convictions. We affirm Rodriguez's conviction and reverse Blessing's conviction.

I

In early October 1982, two confidential informants told William Martin, a special agent with the Drug Enforcement Administration, that Jose Jimenez and Patrick Treacy wanted to buy Mandrax (methaqualone tablets), a controlled substance. According to the informants, Treacy had $140,000 and a pound of cocaine, the street value of which was estimated to be at least $40,000.00. Martin decided to conduct a reverse undercover operation in which DEA agents would pose as suppliers of narcotics. The informants arranged for Martin to meet with Treacy and Jimenez on October 5 and, at Martin's request, conducted the initial negotiations for the sale price.

Martin met twice with Treacy and Jimenez on October 5 near McAllen, Texas. At the second meeting, Martin showed Treacy approximately 400,000 Mandrax pills, which Treacy and Jimenez agreed to buy for $340,000. During this discussion, Treacy indicated he knew someone who could transport the pills. As a gesture of good will, Martin gave Treacy ten pills, and in return, Treacy gave Martin $10,000 as a down payment.

On October 15, Treacy called Martin, and said he would be returning to McAllen on the 18th. When Treacy arrived at Harlington airport in McAllen, Blessing was with him. Blessing rented a car from an airport rent-a-car agency with his credit card because Treacy did not have a major credit card. Treacy and Blessing then drove to a Holiday Inn, where Treacy checked into room 216. Treacy paid for his room in cash. On October 19, Treacy called Martin to arrange a meeting because Treacy wanted more samples. They met shortly after lunch at Denny's Restaurant and then

drove to La Plaza shopping mall. There, Martin gave Treacy ten pills, and Treacy gave Martin one ounce of cocaine worth $2500. Treacy said he had some cars available to trade as part of the deal. He showed Martin photographs of three cars, which Treacy said belonged to a car dealer in Weslaco, Texas. To Martin, the cars corroborated Treacy's statement that someone in the Valley owed him money. Treacy told Martin he would show the sample of pills to his "money people" in the Valley and get back in touch about closing the deal.

When he left the meeting, Treacy went by his hotel room and then drove alone to Weslaco in the car rented with Blessing's credit card. In Weslaco, Treacy stopped at a convenience store and then went to Rodriguez's home, where he remained for over one and one-half hours. After leaving Rodriguez's home Treacy called Martin and approved the transaction arranged earlier that day.

On October 20, DEA agents observed Treacy and Blessing leave Treacy's hotel room

and drive to a car rental agency, where Blessing rented a white van. Later DEA agents watched Rodriguez and Treacy leave the hotel room and drive in the van to La Plaza Mall, where Rodriguez got into a Cadillac. Both men then drove back to the Holiday Inn, Rodriguez in the Cadillac and Treacy in the van.

When Rodriguez got out of the Cadillac at the Holiday Inn, he was carrying a brown paper bag bearing a Carl's Food-N-Stuff logo. He carried the bag into an enclosure. Treacy had entered the enclosure before Rodriguez. Blessing walked into the enclosure last. Neither Treacy nor Blessing carried anything into the enclosure. Treacy left the enclosure carrying the Carl's Food-N-Stuff paper bag and drove away in the van to meet with Martin at Denny's. Blessing walked into the Holiday Inn office, and then drove away in the Cadillac with Rodriguez.

At Denny's, Martin inquired about the money, and Treacy said it was under the passenger's seat in the van. Martin went into the van and pulled out a Carl's Food-N-

Stuff paper bag filled with money. After telling Treacy to follow him, Martin got out of the van and gave the signal to arrest Treacy. A short time later, Blessing and Rodriguez were arrested at another location.

Blessing, Rodriguez, Treacy, and Jimenez were indicted for conspiring to possess with the intent to distribute a controlled substance in violation of 21 U.S.C. § 846. Jimenez was never arrested and the indictment against Treacy was dismissed on a motion by the government. Blessing and Rodriguez were convicted by a jury. Blessing received a two-year prison sentence and a fine of $5000. Rodriguez was sentenced to eight years imprisonment.

II

Both defendants argue that the evidence presented at trial is insufficient to support their conspiracy convictions. We address their arguments under the familiar standard of Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942): "The verdict of a jury must be sustained if there is

substantial evidence, taking the view most favorable to the Government, to support it." Id. at 80, 62 S.Ct. at 469. "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc). In United States v. Gordon, 712 F.2d 110 (5th Cir. 1983), a drug conspiracy case brought under 21 U.S.C. § 846, this court summarized the principles that guide our analysis:

> In drug conspiracy cases, the government must prove beyond a reasonable doubt that a conspiracy existed, that the accused knew of the conspiracy, and that he knowingly and voluntarily joined it. United States v. Jackson, 700 F.2d 181

(5th Cir. 1983). It is unnecessary in drug conspiracy cases to prove an overt act in furtherance of the conspiracy. United States v. Kupper, 693 F.2d 1129, 1134 (5th Cir. 1982). The government must show beyond a reasonable doubt that the defendant had the deliberate, knowing, and specific intent to join the conspiracy. United States v. Galvan, 693 F.2d 417, 419 (5th Cir. 1982), and this court will not "lightly infer a defendant's knowledge and acquiescence in a conspiracy." Jackson, 700 F.2d at 185. It is not enough that the defendant merely associated with those participating in a conspiracy, id., nor is it enough that the evidence places the defendant in "a climate of activity that reeks of something foul." Galvan, 693 F.2d at 419.

712 F.2d at 114.

A

As evidence supporting Blessing's conviction, the government points to his arrival in McAllen with Treacy on October 18. Treacy had earlier told Martin on October 15 that he would arrive in McAllen with his "partner," but did not specifically identify Blessing. Because Blessing arrived with Treacy, the government argues, Blessing was Treacy's partner. Together, Treacy and Blessing checked into the same room at a Holiday Inn in McAllen. Blessing's most significant connection with the conspiracy is that he rented two vehicles, a van and a car, that were used by the coconspirators in furtherance of the conspiracy. Blessing also checked out of the Holiday Inn with Rodriguez at the time Treacy went to deliver the purchase money to Martin. The government concedes that Treacy never said anything to Martin that implicated Blessing or Rodriguez.

Blessing counters that the government has not shown that he participated in any of the negotiations for the sale of the drugs.

In fact, between October 5 and October 20, Blessing never met with Martin. Blessing did not accompany Treacy to Rodriguez's house on October 19. Neither did he go with Treacy and Rodriguez to transfer the purchase money to Treacy. Blessing rented the car and the van only because he had a major credit card and Treacy did not and because rental agencies require them in lieu of a cash deposit. A search of Treacy revealed that he had no major credit cards in his possession.

We hold that the evidence is insufficient to support Blessing's conviction. Our case law requires more than what the government, at most, has done here--place Blessing in a "climate of activity that reeks of something foul." Galvan, 693 F.2d at 419. Blessing's rental of the van and the car do tend to establish his connection with the conspiracy. See United States v. Davis, 666 F.2d 195, 201 (5th Cir. 1982); United States v. Riggens, 563 F.2d 1264, 1265-66 (5th Cir. 1977), cert. denied, 439 U.S. 848 (1978); United States v. Newcombe, 488 F.2d 190, 192 (5th Cir. 1974)

(per curiam). But with no more than what the government has proven here, renting the two vehicles cannot sustain Blessing's conviction. We reverse Blessing's conviction for lack of sufficient evidence that Blessing "had the deliberate, knowing, and specific intent to join the conspiracy." United States v. Gordon, 712 F.2d at 114. Because we reverse Blessing's conviction, we do not reach his other content tentions on appeal.

B

As to Rodriguez, the government points out that Treacy visited Rodriguez's home on October 19 for nearly one and one-half hours. Treacy's visit occurred shortly after he met with Martin to arrange the drug purchase. At that meeting with Martin, Treacy had said he would take the samples to his "money people" in the Valley before closing the deal with Martin. On the day of the purchase, Rodriguez drove a Cadillac from the La Plaza Mall to the Holiday Inn, where he entered an enclosure carrying a Carl's Food-N-Stuff paper bag. Treacy left with the bag and placed it in

the van. Later Treacy was arrested after Martin seized this bag, which was filled with the purchase money.

Rodriguez asserts that the government's case consists of a chain of insufficiently unconnected inferences. Although Treacy did visit Rodriguez's home, there is no evidence that Rodriguez was home that day or, if he was, that the meeting's purpose was to further the conspiracy. The government did not show that the bag Rodriguez carried into the enclosure contained money and that, if the bag did contain money, it was delivered to Treacy to purchase drugs.

We reject Rodriguez's argument. Treacy journeyed to Rodriguez's home immediately after telling Martin he had to see his "money people," and then, after leaving Rodriguez's home, called Martin to approve the deal. This activity could be taken by a reasonable juror to link Rodriguez to the conspiracy. Rodriguez's entry into the enclosure with the paper bag and his exit without it could similarly indicate that he intended to give it

to Treacy. This evidence is sufficient to support the jury's conviction of Rodriguez.

Rodriguez makes three other arguments in this appeal. First, he argues that the enhancement provision of the target substantive statute, 21 U.S.C. § 841, (Footnote Omitted) does not apply to 21 U.S.C. § 846, (Footnote Omitted) the conspiracy statute under which Rodriguez was convicted. He argues that a sentence for a conviction under the conspiracy statute can be enhanced only if there exists a prior conviction for the target offense. In other words, Rodriguez contends that his prior conviction for participation in a separate drug conspiracy cannot form the basis for enhancing his sentence for this second conspiracy conviction. Rodriguez cites no authority for his position, but says we should apply the reasoning of Bifulco v. United States, 447 U.S. 100 S.Ct. 2247 65 L.Ed.2d 609 (1980). Bifulco held that the special parole term provisions in § 841 do not apply to a conspiracy conviction under § 846. Id. at 388, 102 S.Ct. at 2253. In

analyzing § 846 the Court concluded that the term "imprisonment" as used in § 846 did not encompass the special parole provision in § 841. Id. at 338-90, S.Ct. 2252-53. The Court noted the functional distinction between special parole and incarceration and also pointed out that special parole provisions are not included in all substantive offenses to which § 846 applies. Id. at 338, 102 S.Ct. 2252. No similar distinction may be drawn between the extended incarceration effect of the enhancement provision in § 841 and the punishment provisions of § 846. To the contrary, they are compatible. The enhancement provision of § 841 applies whether the prior conviction was for violating the target substantive statute or for conspiring to violate the target substantive statute, as was Rodriguez's prior conviction here.

Second, Rodriguez contends that there was insufficient evidence of the existence of a conspiracy to allow the introduction of a coconspirator's hearsay evidence. The trial

court conducted the hearing mandated by United States v. James, 590 F.2d 575 (5th Cir. 1979), cert. denied, 442 U.S. 917 (1976), and concluded that there was sufficient independent evidence of the conspiracy. The evidence includes Martin's testimony regarding his conversations with Treacy, the surveilling agents' testimony regarding the defendants' movements, the handling of the money by Rodriguez, and the location of the money in the van. The coconspirator's statements were properly admitted.

Last, Rodriguez asserts that his confrontation rights under the sixth amendment were violated because the government failed to reveal the existence of the plea bargain with Treacy and because hearsay testimony was introduced against him. The failure to learn the terms of the plea agreement did not in any way infringe Rodriguez's right to confront Treacy since he was not a witness. When asked to require the government to reveal the contents of the plea agreement,

the district court stated, "I will not cause (the plea agreement) to be made available unless (Treacy) is called as a witness." Record on Appeal, Vol. IV, at p. 239. Rodriguez's counsel considered Treacy unavailable as a witness because Treacy told him that the terms of the plea agreement prevented him from testifying and because counsel felt that, if called, Treacy would invoke the fifth amendment privilege against self-incrimination. Rodriguez's counsel "did not bring the issue of (Treacy's) unavailability into the ambit of the 'discretion of the trial court to accept or reject counsel's representations' concerning (Treacy's) refusal to testify." United States v. Fernandez-Rogue, 703 F.2d 808, 813 (5th Cir. 1983) (quoting Bailey v Southern Pacific R.R., 613 F.2d 1385, 1390 (5th Cir.), cert. denied, 449 U.S. 836, 101 S.Ct. 109, 66 L.Ed.2d 42 (1980)). Rodriguez states that the admission of hearsay violated his right to confront witnesses but does not identify any specific evidence. (Footnote Omitted) We reject Rodriguez's

argument. "It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced." Dutton v. Evans, 400 U.S. 81, 80, 91 S.Ct. 210, 215 (1970).

The conviction of Rene Garcia Rodriguez is AFFIRMED. The conviction of Conrad John Blessing, III, is REVERSED.

(2)

No. 83-2130

In the Supreme Court of the United States

OCTOBER TERM, 1984

RENE G. RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's enhanced sentence imposed for conspiring to possess methaqualone with intent to distribute was lawful.

2. Whether the government's failure to reveal a bargain with a co-defendant denied petitioner his Confrontation Clause rights where petitioner declined to call the co-defendant as a witness and inquire about the bargain.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2130

RENE G. RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B17) is reported at 727 F.2d 353.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1984, and a petition for rehearing was denied on March 28, 1984 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on May 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiring to possess methaqualone with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to eight years' imprisonment, an enhanced sentence that was

based on a prior narcotics conviction. The court of appeals affirmed (Pet. App. B1-B17).[1]

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. B2-B6). It showed that in October 1982, DEA Agent William Martin posed as a supplier of methaqualone after an informant related that Jose Jimenez and Patrick Treacy wanted to buy the drug. At an October 5 meeting near McAllen, Texas, Treacy and Jimenez agreed to buy 400,000 Mandrax (methaqualone) pills for $340,000, and Treacy gave Martin a $10,000 down payment in return for a sample of 10 pills. On October 19, Treacy gave Martin one ounce of cocaine worth $2,500, and Martin gave Treacy 10 more sample pills. Treacy told Martin that someone owed him money and that he would show the sample pills to his "money people" and then recontact Martin.

Treacy left Martin and drove to Weslaco, Texas, where he stopped at petitioner's home for an hour and a half. He then called Martin and agreed to the transaction arranged earlier that day. The next day, DEA agents observed Treacy and petitioner leave Treacy's hotel room and drive to a mall where petitioner got into a Cadillac. Both men then drove back to Treacy's motel in separate vehicles. When petitioner got out of the Cadillac, he was carrying a brown paper bag bearing a "Carl's Food-N-Stuff" logo. Petitioner carried the bag into an enclosure that was already occupied by Treacy. Treacy left the enclosure carrying the bag and went to meet Martin.

At Treacy's subsequent meeting with Martin, Treacy said that the money for the pills was under the passenger seat in his van. Martin got into the van and pulled out a "Carl's

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[1]The court of appeals concluded that the evidence supporting the conviction of petitioner's co-defendant, Conrad John Blessing, was insufficient, and it reversed Blessing's conviction (Pet. App. B10-B11).

Food-N-Stuff" bag filled with money. Treacy was then arrested, and petitioner was arrested a short time thereafter.

2. On appeal, petitioner contended, inter alia, that his eight-year enhanced sentence, imposed pursuant to 21 U.S.C. 841(b)(1)(B), was unlawful. Petitioner argued that the district court could have imposed only the five-year maximum sentence allowable for the substantive offense of possessing methaqualone with intent to distribute it (21 U.S.C. 841) and that Section 841's enhancement provision (21 U.S.C. 841(b)(1)(B)) does not apply when the prior conviction relied upon for enhancement is a conspiracy conviction under Section 846. The court of appeals disagreed, concluding that *Bifulco* v. *United States*, 447 U.S. 381 (1980), upon which petitioner relied, was distinguishable. In *Bifulco*, this Court held that the term "imprisonment," as used in the conspiracy statute, 21 U.S.C. 846, did not encompass the special parole provision set forth in the penalty section, 21 U.S.C. 841. Here, by contrast, the court of appeals concluded that there is no functional distinction between extended incarceration, as authorized by Section 841, and the term "imprisonment," as used in Section 846. Pet. App. B13-B14.

Petitioner also claimed that he was denied his right to confront Treacy because the government failed to reveal the existence of a plea bargain with Treacy that allegedly required him to remain silent. The court of appeals rejected this argument, noting that Treacy was available to petitioner as a witness, but petitioner never called him or attempted to demonstrate that he would not testify if called. Pet. App. B14-B16.

ARGUMENT

1. Although he acknowledges (Pet. 8) that he is raising an issue of first impression and therefore cites no authority for his position, petitioner argues that the "rule of lenity"

applied in *Bifulco* should be applied here to prevent a court from imposing an enhanced term of imprisonment under 21 U.SC. 841 for a violation of the conspiracy statute, 21 U.S.C. 846.[2] Petitioner's argument is without merit.

In *Bifulco*, this Court recognized that under Section 846 conspiracy is punishable by "imprisonment or fine or both," but that the punishment may not exceed the maximum punishment prescribed for a violation of the substantive target offense.[3] Because the word "imprisonment" as used in Section 846 did not clearly encompass a special parole term as described in the penalty provisions of the target offense, Section 841, this Court applied the rule of lenity and held that special parole terms could not be imposed in conspiracy cases. Here, by contrast, there is no statutory ambiguity calling for application of the rule of lenity. Section 846 clearly prescribes a term of *imprisonment* that may not exceed the term of imprisonment allowed for the target offense. Section 841, the offense underlying the conspiracy, permits an enhanced term of *imprisonment* if the defendant has a prior narcotics conviction. The court of appeals thus correctly concluded (Pet. App. B14) that there is no "functional distinction" between extended incarceration and the imprisonment expressly authorized under Section 846.

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[2]Petitioner no longer appears to argue, as he did below, that the enhanced sentence was improper because his prior conviction, like the instant one, was a conspiracy conviction. Instead, he simply argues that no enhanced sentence may be imposed for a conspiracy conviction, without regard to whether the prior conviction was for the "target" offense or for conspiring to violate the "target" statute.

[3]21 U.S.C. 846 provides in pertinent part:

> Any person who * * * conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the * * * conspiracy.

2. Petitioner next contends (Pet. 14-18) that the trial court's refusal to order the government to disclose a plea agreement that it might have made with Treacy denied him his confrontation rights. The court of appeals correctly rejected petitioner's claim, and its decision does not warrant further review.

Contrary to petitioner's contention, he simply was not denied his right to confront Treacy. The district court declined to order revelation of any agreement between Treacy and the government unless Treacy was called as a witness. The trial court also specifically ruled that Treacy was available as a witness (Tr. 236).[4] Petitioner nonetheless failed to call Treacy and question him regarding any plea agreement that might have precluded his testimony. Having failed to avail himself of the opportunity to question Treacy, petitioner cannot now complain that he was denied his Confrontation Clause rights. See *United States* v. *Fernandez-Roque*, 703 F.2d 808, 813 (5th Cir. 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]The prosecution made no "deal" with Treacy that affected his availability as a defense witness. Rather, the prosecution agreed only that Treacy would not be called as a prosecution witness. See Br. for Appellee 15.